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MAR 15 2005

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

LUTHER D. THOMAS, Clerk  
By: *[Signature]* Deputy Clerk

**TONY L. WARE, CEO and  
T. L. WARE BOTTLING CO., INC.,**

**Plaintiffs,**

**vs.**

**FLEETBOSTON FINANCIAL CORP.  
F/K/A BANKBOSTON CORP.**

**Defendant.**

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)  
)  
)  
) **CIVIL ACTION FILE NUMBER:**  
) **1 : 0 5 - C V - 0 4 2 6 - M H S**  
)  
) **MOTION TO DISMISS AND REMAND**  
)  
) **MEMORANDUM OF LAW IN SUPPORT**

**MOTION TO DISMISS AND REMAND CASE**

**COMES NOW, TONY L. WARE, CEO and T.L. WARE BOTTLING COMPANY, INC.,** the Plaintiffs and files their Joint Motion to Dismiss and Remand Case pursuant to the **Federal Rules of Civil Procedures, Rule 12(h)(3)** against the above-named Defendant **FLEETBOSTON FINANCIAL CORPORATION.** The Court must remand on Plaintiffs' motion pursuant to **28 U.S.C. § 1447(c)** this civil action back to the Superior Court of Fulton County on the following grounds to wit:

1. The Court is required to remand this civil matter because the Notice of Removal is legally insufficient as it is untimely under **28 U.S.C. §1446(b)** filed 34 days late after Defendant FleetBoston of Rhode Island was served of the initial Summons and Complaint on **December 10<sup>th</sup>, 2004.** Therefore, the Court must remand this case back to the Superior Court of Fulton County because the Notice of Removal is untimely.

2. This civil action is against FleetBoston Financial Corporation f/k/a BankBoston Corporation a Rhode Island corporation and not FleetBoston Financial Corporation a Delaware corporation which such

1 corporation is a "Shell or Dummy" corporation used by the above named  
2 Defendant to mislead the Plaintiff, the Court and the general public.

3 Therefore, since the Plaintiffs were under the impression that both  
4 corporations were deemed one corporation due to these corporations use  
5 of the same corporate name "FleetBoston Financial Corporation" in  
6 commerce and trade at the time of service of process. Both corporations  
7 were properly served with Summons and Complaint because both  
8 corporations had withdrawn from doing business in this State and had  
9 legally appointed the Georgia Secretary of State to be their agent for all  
10 service of process. Only Defendant FleetBoston Financial Corporation  
11 f/k/a BankBoston Corporation a Rhode Island corporation had the right to  
12 remove this case as a matter of law. Thus, if FleetBoston Financial  
13 Corporation of Delaware had wished to intervene in this action, it should  
14 have done so in the trial Court below. It is now too late to intervene after  
15 the case has been improperly removed. Furthermore, FleetBoston  
16 Financial Corporation of Delaware needed FleetBoston Financial  
17 Corporation f/k/a BankBoston Corporation of Rhode Island consent prior  
18 to removal of this case under the unanimity rule set by the Court of  
19 Appeals for the Eleventh Circuit. See, In re Bethesda Mem'l Hosp., Inc.,  
20 123 F.3d 1407, 1410 n.2 (11<sup>th</sup>, Cir 1997) ("The failure to join all  
21 defendants in the petition is a defect in the removal procedure").

22 3. The Court lacks subject matter jurisdiction over this civil matter  
23 because it lacks removal jurisdiction. Because the State Court enjoys  
24 concurrent jurisdiction with District Courts over Federal RICO claims this  
25 Court does not have original jurisdiction over Federal RICO claims under  
28 U.S.C. § 1331 (federal question). See, Cogdell v. Wyeth, 366 F.3d  
1245, 1247 (11<sup>th</sup>, Cir 2004).<sup>1</sup>

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<sup>1</sup> Thus Cogdell Supra held that ("Thus, one prerequisite for removal jurisdiction is that the case originated in the state court. Another is that the defendant remove the case to the proper federal district court. A third is that the federal district court have original jurisdiction to entertain the law suit. If any one of these prerequisites is lacking, the district court can be said to lack removal jurisdiction").

1           4. The Court lacks subject matter jurisdiction over this civil matter  
 2 because the Notice of Appeal to the Supreme Court of Georgia made the  
 3 Notice of Removal moot as a matter of law. Plaintiff Tony L. Ware was  
 4 appealing the final judgment and all orders issued in this action and his  
 5 appeal was subject to review by the Georgia Supreme Court. FleetBoston  
 6 Financial Corporation of Delaware knew that such appeal was pending  
 7 before the Georgia Supreme Court prior to removal. Therefore this Court  
 8 lacks subject matter jurisdiction to remove appellate jurisdiction from the  
 9 Georgia Supreme Court.

10           5. That both FleetBoston Financial Corporation of Rhode Island  
 11 and FleetBoston Financial Corporation of Delaware are barred from  
 12 bringing and maintaining any removal proceeding without having first  
 13 obtained a new Certificates of Authority from the Georgia Secretary of  
 14 State pursuant to O.C.G.A. § 14-2-1502(a).

15           **WHEREFORE,** The Plaintiffs hereby prays and demands that this Court  
 16 enter a FINAL ORDER dismissing Defendant's claims for lack of subject matter  
 17 jurisdiction and remand this civil action back to the Superior Court of Fulton County  
 18 and the Georgia Supreme Court so that the Plaintiffs in this matter can protect their  
 19 legal rights as a matter of law. The Plaintiffs request any further relief deemed proper  
 20 and just by the Court: Plaintiff's Attorney request all attorney fees and Costs.

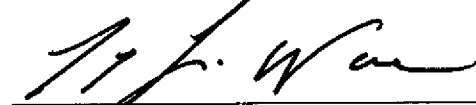
21           This 15<sup>th</sup>, day of MARCH, 2005.

22           **Agreed and Consented to By:**

23           

24           **Michael R. Johnson, Sr.**  
 25           **Attorney for the Plaintiff**  
               **Georgia Bar No. 395056**  
               **Johnson & Associates, P. C.**  
               **340 West Peachtree Street, N.E.**  
               **Suite 200**  
               **Atlanta, Georgia 30308**  
               **(404) 688-7100**

**Agreed and Consented to By:**



**Tony L. Ware, JD, Plaintiff**  
               **Chairman & CEO**  
               **P. O. Box 150524-Dept. 0227**  
               **Atlanta, Georgia 30315-0188**  
               **(404) 945-0342**